

MAY 15 1929

JAMES B. MAHER,

# Supreme Court of the United States

No.

1841

HENRY S. DE REES,

*Plaintiff-Appellant,*

*against*

DAVID COSTAGUTA, MARCOS A. ALGIERS, ALEJAN-  
DRO SASSOLI, EUGENIO OTTOLENGHI, individually  
and as co-partners in business composing the co-partner-  
ship of David Costaguta & Company, BENADO TAF-  
FELL and the AMERICAN-EUROPEAN TRADING  
CORPORATION,

*Defendants-Appellees.*

## MOTION TO ADVANCE CAUSE FOR HEARING

MARION ERWIN,

FREDERICK M. CZAKI,

*Solicitors for Plaintiff-Appellant.*

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1920.

HENRY S. DE REES

VS.

DAVID COSTAGUTA *et al.*

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Appeal from the United States District Court  
for the Southern District of New York.

**Motion by the Plaintiff Under Rule 32  
to Advance.**

COMES NOW the plaintiff, by his solicitors,  
Marion Erwin and Frederick M. Czaki, and re-  
spectfully moves the Court to place the above en-  
titled cause on the summary docket for hearing  
on a day convenient to the Court during the next  
term.

This is a suit in equity filed by the plaintiff on  
March 10th, 1920, in the District Court of the  
United States for the Southern District of New  
York, against David Costaguta, Marcos A. Algiers,  
Alejandro Sassoli and Eugenio Ottolenghi, indi-  
vidually and as co-partners composing the firm of

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- 4 David Costaguta & Company, Renado Taffell and the American-European Trading Corporation, seeking, inter alia, to establish and enforce a partnership claim and lien upon certain designated personal property within the Southern District of New York, the allegations of the bill averring the existence of a partnership between the plaintiff and the defendants Costaguta, Algiers, Sassoli and Ottolenghi. A more particular description of the bill, the relief prayed for therein, and the proceedings had in said cause subsequent to the filing of said bill, together with extracts from the record, being averred and set out in the accompanying affidavit, to which the Court's attention is respectfully directed.

- 5 That the said District Court, upon the return of a rule nisi for the appointment of a Receiver and for an injunction pendente lite, dismissed the bill of complaint as to all of the defendants and entered final decrees dismissing the bill, vacating the service of the subpoena and vacating an order for substituted service upon the non-resident alien defendants, upon the ground that the Court was without jurisdiction of the parties to or of the subject-matter of the suit.

- 6 That thereupon the plaintiff filed his petition for an appeal to this Court, pursuant to Section 238 of the Judicial Code, which was duly allowed, and the said District Court duly certified that the final decrees, dismissing said bill, were entered solely because the cause, as made by the bill, did not set forth a legal or equitable claim to or lien upon property in the District of which said Court had jurisdiction, within the meaning of Section 57 of the Judicial Code, or a suit in which said Court

could render a judgment otherwise than a judgment in personam against the non-resident aliens who had appeared specially and objected to the jurisdiction of the Court. 7

That the only question in issue in the above cause is that of the jurisdiction of the Court below and it requires no extended argument and can readily be presented by each side conformably to the rule for causes advanced and placed upon the summary docket of this Court.

Notice of this motion and of the accompanying affidavit has been served on opposing counsel.

MARION ERWIN,  
FREDERICK M. CZAKI,  
Solicitors for Plaintiff-Appellant, 8  
15 William St.,  
New York City.



**Notice of Motion.**

**Supreme Court of the United States**

HENRY S. DE REES,  
Plaintiff-Appellant,  
against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individ-  
ually and as co-partners in  
business composing the co-  
partnership of David Costagu-  
ta & Company, RENADO TAF-  
FELL and the AMERICAN-EURO-  
PEAN TRADING CORPORATION,  
Defendants-Appellees.

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*Sirs:*

YOU WILL PLEASE TAKE NOTICE that upon the record herein, duly docketed in the office of the Clerk of this Court, and the annexed affidavit of Frederick M. Czaki, verified the 27th day of April, 1920, the undersigned will respectfully move this Court at a Stated Term thereof, to be held at the Capitol, in the City of Washington, District of Columbia, on the 17th day of May, 1920, at the open-

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- 4 ing of the Court on said day, or as soon thereafter as counsel can be heard, that an order be made and entered herein directing that the above entitled cause be advanced for hearing upon the docket of this Court, pursuant to the provisions of Rule 32, upon the ground that the only question at issue is the question of the jurisdiction of the District Court of the United States for the Southern District of New York, from which the appeal herein has been taken pursuant to Section 238 of the Judicial Code, and that the plaintiff-appellant have such further and other relief as to this Honorable Court may seem just and proper.

Dated, New York, April 27th, 1920.

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Yours, etc.,

MARION ERWIN,  
FREDERICK M. CZAKI,  
Solicitors for Plaintiff-Appellant,  
15 William Street,  
New York City.

To:

ESSELSTYN & HAUGHWOUT, Esqs.,  
Attorneys for Defendants-Appellees Taffell  
and American-European Trading Corporation,  
2 Rector Street,  
New York City.

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WALTER H. MERRITT, Esq.,  
Attorneys for Defendants-Appellees Costaguta,  
Algiers, Sassoli, Ottolenghi and David Cos-  
taguta & Company,  
54 Wall Street,  
New York City.

**Affidavit of Frederick M. Czaki.**

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SUPREME COURT OF THE UNITED STATES.

HENRY S. DE REES,  
Plaintiff-Appellant,

against

DAVID COSTAGUTA, MARCOS A.  
ALGIERS, ALEJANDRO SASSOLI,  
EUGENIO OTTOLENGHI, individ-  
ually and as co-partners in  
business composing the co-  
partnership of David Costagu-  
ta & Company, RENADO TAF-  
FELL and the AMERICAN-EURO-  
PEAN TRADING CORPORATION,  
Defendants-Appellees.

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CITY AND STATE OF NEW YORK, }  
COUNTY OF NEW YORK, } ss. :

FREDERICK M. CZAKI, being duly sworn, deposes  
and says:

I. That he is one of the solicitors of the plaintiff-  
appellant in the above entitled cause, and has been  
and now is in charge of the conduct of the said  
cause and is familiar with the facts and circum-  
stances in relation thereto.

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II. That on the 10th day of March, 1920, the  
above named plaintiff-appellant, averring himself  
to be a citizen of the State of New Jersey, duly  
filed in the office of the Clerk of the District Court



10 of the United States for the Southern District of New York a bill in equity against the above named defendants, averring that the defendants David Costaguta and Alejandro Sassoli were citizens and subjects of the Kingdom of Italy, Eugenio Ottolenghi a citizen of the Republic of Argentine, and Marcos A. Algiers a citizen of the Republic of France, and that said David Costaguta, Alejandro Sassoli, Eugenio Ottolenghi and Marcos A. Algiers were and now are residents of the City of Buenos Aires, Republic of Argentine. That the defendant the American-European Trading Corporation was a corporation organized under and existing by virtue of the laws of the State of New York, and having its office and place of business in the City of New York, Southern District of New York.

11 That the defendant Renado Taffell was a citizen of the Kingdom of Great Britain and Ireland, and now is a resident of the said Southern District of New York, and that said Taffell is the Secretary and Treasurer of the defendant the American-European Trading Corporation, and one Leon Grumet is the President thereof, and that said Grumet is, under power of attorney, the agent and duly constituted representative in the Southern District of New York of the said defendants Costaguta, Algiers, Sassoli and Ottolenghi, doing business under the firm name of David Costaguta & Company.

12 III. That in and by said bill, as aforesaid, the said plaintiff-appellant asserted and sought to enforce a co-partnership claim and lien upon certain designated specified personal property within the Southern District of New York, the allegations of said bill averring that a partnership existed between the plaintiff-appellant and the said defend-

ants Costaguta, Algiers, Sassoli and Ottolenghi, an agreed translation of the articles of co-partnership being contained in the record herein. That said bill further alleged an actual termination of the partnership relation by the notice provided for in said contract and notice to liquidate the property of the co-partnership pursuant thereto, and that a liquidation of the property of the co-partnership was in process between said co-partners. That said bill further alleged that said non-resident alien defendants, in violation of the contract, had taken possession of all of the assets of the co-partnership to the exclusion of the plaintiff-appellant and without his consent had converted a large part thereof located in the Southern District of New York to their own use, by transferring the same to the defendant corporation, which was created by said non-resident alien defendants since said liquidation was commenced, and that said property of said co-partnership was so transferred to said defendant corporation by said non-resident alien defendants, without consideration, and that they, said non-resident alien defendants, own all of the corporate stock of said defendant corporation.

IV. The bill prayed, among other things, that the plaintiff-appellant be decreed to have a lien upon all the property of the said co-partnership within the district, and upon all of the property of the said non-resident defendants and of said defendant corporation within the district, into which the property or assets of the co-partnership have been converted or commingled, and that all of said property of said co-partnership and the capital stock of the defendant corporation standing in the name of said non-resident alien defendants in the

- 16 district be decreed to be charged with a trust in favor of the plaintiff. That by its decree the Court will declare said co-partnership dissolved, and will appoint a receiver to preserve, conserve and administer said co-partnership assets and the properties into which they have been so converted *pendente lite*, and that the defendants be restrained and enjoined *pendente lite* from disposing of or removing without the jurisdiction of the Court the property of said co-partnership or the property of the said defendants into which the property of the said co-partnership had been commingled or converted. It contained the usual prayer for subpoena, and prayed that the District Court shall make an order setting forth that the plaintiff claims an interest
- 17 in and lien upon said property, the situs of which then was in the district, and requiring such non-resident alien defendant as may not then be found in the district to demur, plead or answer to the bill on or before a day therein to be named, and for publication of said order in accordance with the statute in such case made and provided. The bill prayed for a liquidation of the assets within the jurisdiction of the Court, through the receiver of the Court, an accounting from the defendants and the determination and enforcement of plaintiff's co-partnership interest upon the assets within the jurisdiction of the Court and for general relief.

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V. That on said 10th day of March, 1920, a writ of subpoena was duly issued out of the District Court of the United States for the Southern District of New York, directed to each and all of the defendants, and the same was duly served upon the

resident defendant, the American-European Trading Corporation, and the resident defendant Renaldo Taffell, and was likewise served upon one Leon Grumet, as agent and attorney in fact of the non-resident alien defendants. That a return was made on said subpoena by the United States Marshal for the Southern District of New York that, after due and diligent search, he was unable to find within the Southern District of New York, the said non-resident alien defendants. 19

VI. That simultaneously with the filing of the said bill of complaint as aforesaid, the said District Court, upon affidavit and exhibits thereto annexed, issued a rule *nisi*, requiring the defendants to show cause, at a time therein stated, why a receiver should not be appointed and an injunction granted *pendente lite*, said rule *nisi* containing a temporary restraining order enjoining and restraining said defendants, their agents and attorneys, pending the hearing and determination upon the return of said rule *nisi*, from in any manner disposing of or removing from the jurisdiction of said District Court, any of the property of said co-partnership or of said defendants into which the property of said co-partnership was converted and commingled, said rule *nisi* and the papers upon which it was granted having been duly served upon the resident defendants, the agent and attorney in fact of the non-resident alien defendants, said Leon Grumet, and upon all persons, firms and corporations having possession, custody or control of any of said property and of the property more particularly mentioned and described in said bill of complaint and upon which said plaintiff asserted and sought to enforce his claim and lien. 20 21

22 VII. That thereafter and on the 16th day of March, 1920, the said District Court, upon the affidavit of your deponent verified the 15th day of March, 1920, and the return of the United States Marshal, duly made its order in said cause requiring said non-resident alien defendants to appear, plead, answer or demur to said bill of complaint on or before a day therein named, and directing the publication of said order and that said order with a copy of said bill of complaint and subpoena be served upon said non-resident alien defendants as therein more particularly provided and pursuant to the provisions of Section 57 of the Judicial Code, providing for substituted service upon non-resident  
23 defendants.

VIII. That thereafter and on the 19th day of March, 1920, the resident defendants American-European Trading Corporation and Renado Taffell appeared herein specially by Messrs. Esselstyn & Haughwout, for the sole purpose of objecting to the jurisdiction of said District Court and to oppose on that ground the application for the appointment of a receiver and for an injunction *pendente lite*, and that thereafter and on the 23rd day of March, 1920, the said non-resident alien defendants appeared herein specially by Walter H. Merritt, Esq., solely for the purpose of applying to the said District Court for an order vacating, quashing and  
24 setting aside the service of the said subpoena and the order of the said District Court, dated the 16th day of March, 1920, directing that substituted service of said subpoena be made upon the said non-resident alien defendants, as in said order more particularly provided, and said non-resident alien defendants did, on said 23rd day of March, 1920,

procure an order returnable upon a day therein stated, requiring the plaintiff-appellant to show cause why said service of said subpoena and said order of said District Court directing such substituted service should not be vacated, quashed and set aside and the service under said order for substituted service vacated, annulled and set aside, upon the ground that said Court was without jurisdiction over the persons of said non-resident alien defendants and of the subject-matter of this suit. 25

IX. That thereafter and upon the adjourned return day of the rule *nisi* for a receiver and injunction obtained by the plaintiff-appellant as aforesaid, all of the defendants appeared specially herein in opposition thereto, and the said non-resident alien defendants appeared in support of their application to vacate the service of said subpoena and of the order for the substituted service thereof upon said non-resident alien defendants, and a hearing was had before said United States District Court for the Southern District of New York upon the original bill, processes, orders of the Court, and service and returns made by the Marshal, and upon the moving affidavits and reply affidavits offered by the respective parties, resulting in the rendition of an opinion by said Court denying the application of the plaintiff for the appointment of a receiver and injunction *pendente lite* and granting the application of the defendants, vacating the service of said subpoena, annulling the order for substituted service and for publication thereof and of said subpoena and of the service made thereunder, and dismissing said bill of complaint. 26 27

28 X. That thereafter and on the 10th day of April, 1920, the said District Court, over the objection and exception of the plaintiff-appellant, entered its final decrees upon the motion of the defendants, among other things, dismissing the said bill of complaint as against all of said defendants and vacating said order for substituted service and the service made thereunder. That the decree entered at the instance of the resident defendants provided as follows:

"ORDERED, ADJUDGED AND DECREED, that the motion made by the plaintiff, in and by said order to show cause, be and the same hereby is denied in all respects; and it is

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FURTHER ORDERED, ADJUDGED AND DECREED, that the temporary restraining order contained in said order to show cause be and the same hereby is vacated, annulled and cancelled in all respects; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the bill of complaint be and the same hereby is dismissed.

LEARNED HAND,  
*U. S. D. J.*"

That the decree entered at the instance of the non-resident alien defendants provided as follows:

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"ORDERED, ADJUDGED AND DECREED, that the said order made by the Hon. Learned Hand, United States District Judge, dated the 16th day of March, 1920, be and the same is hereby vacated, quashed and set aside in all respects, and all acts done thereunder either

by the plaintiff or by said Thomas D. McCarthy, United States Marshal, be and the same hereby are declared null and void; and it is 31

FURTHER ORDERED, ADJUDGED AND DECREED, that the alleged service of the subpoena certified by Thomas D. McCarthy, United States Marshal, in and by his certain certificate dated the 11th day of March, 1920, to have been made by him 'upon the within defendant and David Costaguta Co.,' in the manner therein stated, be and the same hereby is declared null and void and of no effect; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the bill of complaint herein be and the same hereby is dismissed as to the defendants David Costaguta, Marcos A. Algiers, Alejandro Sassoli and Eugenio Ottolenghi, individually and as co-partners in business composing the co-partnership of David Costaguta & Company. 32

LEARNED HAND,  
*U. S. D. J.*"

XI. That thereupon and on said 10th day of April, 1920, the plaintiff-appellant duly filed his petition for an order allowing him to prosecute an appeal, as against all of said defendants, from said final decrees direct to the Supreme Court of the United States upon the grounds and for the reasons, among others, that the District Court of the United States for the Southern District of New York had refused to entertain jurisdiction of said bill of com- 33



- 34    plaint and dismissed the same for lack of jurisdiction of the subject-matter and of the parties defendant named in the bill, which said petition was duly granted and an order was duly made by said Court on said 10th day of April, 1920, allowing said appeal upon the ground that said bill of complaint was dismissed for want of jurisdiction and that said District Court of the United States for the Southern District of New York on said bill had no jurisdiction of the subject-matter and of the parties mentioned therein, and directed that the appeal to this Court from said final decrees, entered in this cause as aforesaid, be allowed and that a transcript of the record, bill, appearances, affidavits, exhibits, orders, decrees, proceedings and papers and the opinion of the Court upon which said decrees were made, duly authenticated, be sent to this Court.
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XII. That simultaneously with the allowance of said appeal and on said 10th day of April, 1920, the said District Court of the United States for the Southern District did certify as follows:

- 36    “The plaintiff having entered his appeal to the Supreme Court from the decrees of this Court entered the 10th day of April, 1920, vacating the order for service by publication on the non-resident defendants, and the service of subpoena on all the defendants, and dismissing plaintiff’s bill as more particularly set forth in said decrees,

I HEREBY CERTIFY that said decrees were entered solely because the case as made by the bill did not set forth a legal or equitable claim to or lien on the property in the dis-

trict, of which this Court would have jurisdiction within the meaning of Section 57 of the Judicial Code, or in which this Court could render a judgment otherwise than a judgment in personam against the non-resident aliens who appeared specially and objected to the jurisdiction of the Court. 37

Dated, New York, April 10th, 1920.

LEARNED HAND,

District Judge of the United States, for the Southern District of New York."

That citation to the defendants were duly issued and served, and the plaintiff-appellant has duly perfected his appeal and complied with the orders of the Court providing for security for costs, and for security on an order granted by the Court retaining a substantial amount of assets within the jurisdiction under the 74 equity rule, pending the determination by this Court of said appeal. That the questions involved upon the appeal herein require no extended argument and can readily be presented by each side conformably to the rule for causes advanced and placed upon the summary docket of this court. That the record on appeal herein will be duly filed in the office of the Clerk of this Court and printed prior to the presentation of this motion. 38

WHEREFORE your deponent respectfully prays this Honorable Court that the above entitled cause be advanced upon the calendar of this Court pursuant to the provisions of Rule 32 and placed upon the summary docket, upon the ground that the only question in issue is the question of the jurisdiction 39

40 of the Court below and can be presented without extended oral argument, and that the plaintiff-appellant have such further and other relief as to this Honorable Court may seem just and proper.

That no previous application for the order herewith applied for has been made.

FREDERICK M. CZAKI.

Sworn to before me this  
27th day of April, 1920.

ANNA G. McCONNELL,  
Notary Public,  
Bronx Co. No. 1.

41 Certf. filed in N. Y. County No. 58.

